No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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By holding that an employer may discriminate against a job applicant or employee based on practices that the employer correctly believes to be religious, so long as the employer does not have "actual knowledge" of the need for a religious accommodation based on the explicit statements of the applicant or employee, the Tenth Circuit diverged from other courts of appeals, deviated from the text and structure of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, and opened a safe harbor for religious discrimination. This Court's intervention is needed, and respondent's arguments against review lack merit.

1. As set out in the petition, the Tenth Circuit created a conflict with four other circuits in its interpretation of the notice requirement under Title VII. The

conflict is straightforward: the court of appeals held that an employer need only accommodate an applicant or employee's religious practices if the applicant or employee directly and explicitly "informed the employer that the [applicant or employee] adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice, due to a conflict between the practice and the employer's neutral work rule," Pet. App. 28a, giving rise to "particularized, *actual* knowledge of the key facts that trigger [the employer's] duty to accommodate," *id.* at 34a. The court below defined "particularized, actual knowledge" in contradistinction to an employer's "correct guess or assumption" that a religious conflict existed based on the employer's inferences from religious garb or other sources. *Id.* at 42a n.9.

Three other courts of appeals have held, in contrast, that Title VII obligations are triggered if an employer has "enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Brown* v. *Polk Cnty.*, 61 F.3d 650 (8th Cir. 1995) (en banc) (citation omitted), cert. denied, 516 U.S. 1158 (1996); *Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010). A fourth court of appeals has adopted a similar standard without citing the rule adopted by other courts. *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 450 (7th Cir. 2013) (explaining that "Title VII has not been interpreted to require adherence to a rigid script to satisfy the notice requirement" and that the "employer * * * must be alert enough to grasp that the request

is religious in nature" when an employee makes a request "reasonably clear so as to alert the employer to the fact that the request is motivated by a religious belief"). These courts of appeals do not demand that notice come from explicit verbal statements of the employee giving rise to "actual, particularized knowledge" on the part of the employer.

Respondent contends (Br. in Opp. 19-24) there is no conflict of authority because the Seventh, Eighth, Ninth, and Eleventh Circuits set out their rules in cases in which employers in fact "had actual knowledge of the employee's religious beliefs and the conflict with the work requirement," *id.* at 20, whereas respondent's hiring officials correctly believed there was a conflict but lacked "actual knowledge." The distinction is irrelevant because—whether or not actual knowledge was present in other court of appeals' cases—actual knowledge was not required by the rules that those courts adopted. As noted above, three courts of appeals held that an employer needs to have "*only enough information* * * * to *permit* the employer to understand the existence of a conflict," without regard to the employer's actual understanding. *Brown*, 61 F.3d at 654; *Heller*, 8 F.3d at 1439; *Dixon*, 627 F.3d at 856 (emphasis added). A fourth has likewise held that an employer can be liable under Title VII regardless of whether the employer actually concludes that a conflict exists. *Adeyeye*, 721 F.3d at 450 (7th Cir.) (explaining that "[t]he employer * * * must be alert enough to grasp that the request is religious in nature" and that "an employer cannot shield itself from liability by intentionally remaining in the dark") (internal quotation marks omitted).

In any event, respondent's assertion that these cases involved employers with "actual knowledge of the employee's religious beliefs and the conflict with the work requirement" is incorrect. Br. in Op. 20. *Adeyeye* held that a jury could find letters requesting time off "provided sufficient notice" to an employer to trigger a duty of accommodation without regard to whether the employer understood the employee's request, and made no finding that the employer had actually understood the religious nature of the request. 721 F.3d at 450-451. *Heller* likewise found an employee established a prima facie case under Title VII because an employer received enough information "to permit the employer to understand the existence of a [religious] conflict," 8 F.3d at 1439, without any suggestion that the employer had actual knowledge of the conflict.

Dixon and *Brown* similarly found notice sufficient when employers' words and actions demonstrated that they *believed* there was a conflict between work rules and religious practice—precisely the type of evidence that the Tenth Circuit distinguished from "actual knowledge" and found insufficient as a matter of law in this case. Compare *Dixon*, 627 F.3d at 855-856 (adequate notice despite absence of explicit accommodation request because employer's statements established that employer believed there was a religious conflict); *Brown*, 61 F.3d at 654 (same), with Pet. App. 42a n.9 (finding "actual knowledge" standard not satisfied where hiring official correctly inferred that applicant wore headscarf for religious reasons because the fact that "an employer was able to make a correct guess or assumption would not mean that the employer possessed * * * actual knowledge"). Respondent

describes the facts of these cases at length (Br. in Opp. 20-22) but fails to identify a passage in any of these decisions in which the relevant court found the employer possessed the "actual knowledge" that respondent suggests was these decisions' touchstone.

Respondent also suggests that this case is not an appropriate vehicle for resolving the question of whether actual knowledge is required because respondent "did *not* have actual knowledge of a religious conflict from *any* source." Br. in Opp. 1. But the question presented is whether an employer who assumes correctly that a religious conflict exists and acts on that basis may nonetheless avoid liability because it lacked "actual knowledge" obtained through direct notice given by the applicant. See Pet. i. The absence of "actual knowledge" on the part of respondent is thus a premise of the question presented—not a basis on which to deny review.

Respondent alternatively contends (Br. in Opp. 1-2) that the question presented is best framed as a fact-specific dispute over "[w]hether an applicant adequately informs a prospective employer of the need for a religious accommodation under Title VII simply by wearing an item of clothing which can be but is not always associated with a particular religion." *Id.* at i. But this case does not involve the application of a settled legal standard to particular facts, because, as set forth above, the court of appeals in this case adopted a standard for notice that conflicts with the standards utilized in at least four other courts of appeals. See pp. 1-4, *supra*. And respondent is mistaken to suggest that this case would be resolved the same way under any circuit's standard, because in every circuit "more is required of an applicant" than

simply "wearing an item of clothing which can be but is not always associated with a particular religion." Br. in Opp. 1. Respondent's description of the facts omits that respondent's hiring representatives *did* correctly understand Samantha Elauf's wearing of a headscarf to reflect a religious practice, and that respondent nonetheless elected not to hire Elauf based on her headscarf. These omitted facts are important because, as noted above, courts of appeals applying the more flexible notice standard rejected by the Tenth Circuit have found Title VII's notice requirement satisfied by evidence that company representatives correctly inferred the existence of a religious conflict. See pp. 4-5, *supra*.

Finally, respondent is wrong to suggest that review of the conflicting notice standards applied by the courts of appeals is unwarranted because certain additional courts of appeals have articulated notice standards that may be consistent with the holding of the court of appeals below. Br. in Opp. 14-16. In particular, in *Wilkerson* v. *New Media Technology Charter School Inc.*, 522 F.3d 315 (2008), the Third Circuit held that a school had no duty to accommodate an employee who objected to participating in a "libation ceremony" because the employee "did not inform the defendants that the libation ceremony would offend her religious beliefs." *Id.* at 320. Absent that direct, explicit notice, the court found that even if the employer "suspected that the libations ceremony would offend" the plaintiff, the school was free to fire the plaintiff for refusal to participate. *Id.* at 319-320. But reading *Wilkerson* as consistent with the Tenth Circuit's decision here does not eliminate the conflict

in the circuits; instead, it deepens the conflict, providing additional grounds for this Court's intervention.*

2. Respondent's brief contains nothing to rehabilitate the court of appeals' holding that an employer may refuse to hire an applicant based on what the

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* It is uncertain whether the remaining cases cited by respondent (Br. in Opp. 14-16) reflect agreement with the holding of the court of appeals here. The formulations on which respondent relies are principally one-sentence glosses in cases in which there was no dispute that the notice requirement was satisfied. See *Sánchez-Rodríguez* v. *AT&T Mobility P.R., Inc.*, 673 F.3d 1, 8 (1st Cir. 2012); *Burdette* v. *Federal Express Corp.*, 367 Fed. Appx. 628, 633 (6th Cir. 2010); *EEOC* v. *Thompson Contracting*, 333 Fed. Appx. 768, 771 (4th Cir. 2009); *Morrissette-Brown* v. *Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1321, 1323-1324 (11th Cir. 2007); *Baker* v. *Home Depot*, 445 F.3d 541, 546-548 (2d Cir. 2006); *Peterson* v. *Hewlett-Packard Co.*, 358 F.3d 599, 606-608 (9th Cir. 2004); *Jones* v. *TEK Indus., Inc.*, 319 F.3d 355, 359 (8th Cir. 2003); *Brener* v. *Diagnostic Ctr. Hosp.*, 671 F.2d 141, 144-145 (5th Cir. 1982). The other citations are of a parenthetical in a page-long opinion finding a plaintiff failed to establish any elements of a prima facie case, *Taub* v. *FDIC*, No. 96-5139, 1997 WL 195521, at *1 (D.C. Cir. Mar. 31, 1997) (per curiam); a decision in favor of an employer who "was not aware of [applicant's] religion" based on information from any source, *Xodus* v. *Wackenhut Corp.*, 619 F.3d 683, 686-687 (7th Cir. 2010); and a case addressing intentional discrimination, not religious accommodation, *Nobach* v. *Woodland Vill. Nursing Ctr., Inc.*, No. 13-60397, 2014 WL 3882464 (5th Cir. Aug. 7, 2014). Further, some of the courts of appeals offering the brief formulations cited by respondent have already adopted the more flexible notice standard requiring only information sufficient to apprise the employer of a conflict from any source. Compare *Morrissette-Brown*, 506 F.3d at 1321; *Peterson*, 358 F.3d at 606, with *Dixon*, 627 F.3d at 856 (adopting more flexible standard); *Heller*, 8 F.3d at 1439 (same). In any event, regardless of whether the brief statements on which respondent relies signal agreement with the holding in this case, respondent fails to refute the existence of a circuit conflict on the question presented.

employer correctly believes to be a religious practice, so long as the employer does not have actual knowledge of the religious basis for the applicant's practice based on direct statements of the applicant. This holding is unsupported by the statutory text: an employer who declines to hire an applicant based on what the employer correctly believes to be a religious practice "fail[s] or refuse[s] to hire" an applicant because of "religious observance and practice," 42 U.S.C. 2000e(j), 2000e-2(a)(1), even if the employer has not received direct, explicit notice of the need for an accommodation from the applicant. See Pet. 13-14. And because the court's holding gives employers a strong incentive to avoid hiring applicants believed to require religious accommodation—rather than initiating dialogue—the holding is inconsistent with Title VII's objective of promoting "bilateral cooperation" aimed at reconciling "the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted).

The reasons that respondent marshals in support of the Tenth Circuit's position (Br. in Opp. 12-14) are reasons equally served by the more flexible notice standard of other courts of appeals. To be sure, as respondent suggests, an employer must have some notice of a religious conflict, because "only when sufficiently notified would any employer have a[n] * * * opportunity to take reasonable steps to accommodate an employee's conduct." Br. in Opp. 13 (citation omitted). But that standard is met whenever the employer receives "enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's

religious practices and the employer's job requirements." *Brown*, 61 F.3d at 654. And the concern of fair warning is not implicated when (as here) an employer correctly infers that a conflict exists, and declines to hire an applicant because of the conflict.

Nor is respondent's position supported by the guidelines of the United States Equal Employment Opportunity Commission (EEOC) on which respondent relies (Br. in Opp. 17-19)—which do not by their terms limit permissible notice under Title VII. In the subsection of its guidelines entitled "[d]uty to accommodate," EEOC makes clear that employers must reasonably accommodate religious practices, absent a showing of undue hardship. See 29 C.F.R. 1605.2(b). That subsection does not limit the employers' duty to cases in which they receive notice of a conflict from a particular source. See *ibid.* Indeed, the related EEOC compliance manual—on which respondent itself relies (Br. in Opp. 17-18)—states that an employer's duty arises in any case in which the employer has notice of a conflict. It states in particular that "Title VII requires an employer, *once on notice*, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship." EEOC, *Compliance Manual, Section 12: Religious Discrimination* § 12-IV Overview (2008) (*Compliance Manual*) (emphasis added).

The portion of the EEOC guidelines on which respondent relies (Br. in Opp. 17-19) does not limit the circumstances under which employers' duties arise. The subsection entitled "[r]easonable accommodation" is devoted to explaining the work-rule modifications

that are required (and the modifications that are not required) when an employer has a duty under Title VII, rather than to explaining when an employer has a duty of accommodation at all. 29 C.F.R. 1605.2(c); cf. 29 C.F.R. 1605.2(b) (setting out when employer has "[d]uty to accommodate"). The subsection emphasizes that "[a]fter an employee or prospective employee notifies the employer * * * of his or her need for a religious accommodation"—likely the most common form of notice—the employer "has an obligation to *reasonably* accommodate the individual's religious practices," 29 C.F.R. 1605.2(c)(1) (emphasis added), before describing the scope of "reasonable" accommodations, 29 C.F.R. 1605.2(c)(1) and (2). But the reasonable-accommodation subsection does not purport to limit employers' duties, or to specify forms of notice that are acceptable under Title VII.

Similarly unavailing is the sentence from EEOC's compliance manual on which respondent relies. As noted above, the manual states that an employer has obligations to accommodate religious practices so long as the employer is "on notice" of the need for an accommodation. *Compliance Manual* § 12-IV Overview. EEOC's further direction that an applicant or employee "who seeks religious accommodation" is required to "make the employer aware" of the need for accommodation reinforces that an employer who has not been "ma[d]e * * * aware" of a conflict cannot be held responsible for failing to accommodate it. *Id.* § 12-IV(A)(1); see *ibid.* ("[T]he applicant or employee must provide enough information to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job"). The manual

does not state, however, that notice to an employer must come from explicit verbal statements directly from an applicant or employee. And such a requirement would be in tension both with the portion of the manual stating that employer's obligations are triggered when an employer is "on notice" of a conflict, *id.* § 12-IV Overview, and with the provisions explaining that "[n]o 'magic words' are required to place an employer on notice." *Id.* § 12-IV(A)(1).

3. As set out in the petition (Pet. 23-25), the question presented is one with practical significance. The thousands of religious discrimination charges filed annually with EEOC indicate that the standards of liability for religious discrimination are a matter of importance in real-world disputes. See Pet. 24. And the published decisions signal that many religious-accommodation cases involve employers who received notice of religious conflicts that fall short of the standard that the court of appeals would impose here. See *ibid.* (discussing cases). Further, the notice standard is critically important in the frequently-arising context of religious garb and grooming, where—as here—employers often have superior knowledge of company policies and may perceive and act on an apparent religious practice before an applicant is even aware of any conflict. See *id.* at 24-25 & n.2; Religious Orgs. Amicus Br. 7-8. This Court's intervention is needed to resolve the conflict among the courts of appeal on this important question.

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For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

SEPTEMBER 2014